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International liability for injurious consequences arising out of acts not prohibited by international law (International liability in case of loss from transboundary harm arising out of hazardous activities)

Second report on the legal regime for the allocation of loss in case of transboundary harm arising out of hazardous activities

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Introduction*

1. It may be recalled that in his first report,[1] by way of summation and submissions, the Special Rapporteur identified some broad points, which, if agreed upon, could form the basis for drafting suitable principles governing the legal regime for the allocation of loss in case of transboundary harm arising out of hazardous activities. The International Law Commission, in the report on its work at the fifty-fifth session, submitted to the General Assembly of the United Nations at its fifty-eighth session, also raised some specific questions soliciting the views of Member States to guide the future work of the Commission.[2]

2. States have since then offered a number of valuable comments on these issues and questions while participating in the debate within the Sixth Committee during the fifty-eighth regular session of the General Assembly, in 2003. A few States have also submitted comments separately. It would be useful to review the rich expression of views of States and draw some general conclusions before we proceed further. Such a summary appears in section A of the present report and the general conclusions of the Special Rapporteur are stated in section B. Section C concludes by offering some draft proposals for consideration, with brief explanatory notes.

A. Comments of States on the main issues concerning allocation of loss

1. General comments

3. Several delegations[3] welcomed the first report of the Special Rapporteur on the legal regime for allocation of loss in case of transboundary harm arising out of hazardous activities. The broad policy considerations underpinning the Special Rapporteur's conclusions and findings, including, most importantly, the basic consideration that to the extent feasible the victim should not be left to bear loss unsupported, were endorsed.[4]

4. With regard to the objective of the study, the new emphasis on "allocation of loss", for example, to the operator has made it possible to overcome the conceptual difficulties in delineating the contours of the topic, including separating it from State responsibility. Nevertheless, it was still deemed necessary to clarify and set out its implications in relation to traditional liability regimes, which are based on the

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* The Special Rapporteur is grateful to Professor Alan Boyle, Professor of International Law, University of Edinburg, and William Mansfield, member of the International Law Commission (ILC), for their valuable comments on earlier drafts. The Special Rapporteur, however solely bears the responsibility for any errors or other deficiencies of the present report.

[1] A/CN.4/531, paras. 150-153.

[2] *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 10* (A/58/10), para. 30.

[3] See, for example, statements by Germany, A/C.6/58/SR.14, para. 62; Nigeria, A/C.6/58/SR.16, para. 14; Netherlands, A/C.6/58/SR.16, para. 60; New Zealand, A/C.6/58/SR.16, para. 61; Greece, A/C.6/58/SR.17, para. 22; Italy, A/C.6/58/SR.17, para. 28; Poland, A/C.6/58/SR.17, para. 36; United States of America, A/C.6/58/SR.18, para. 11; United Kingdom of Great Britain and Northern Ireland, A/C.6/58/SR.18, para. 33.

[4] See, for example, statements of New Zealand, A/C.6/58/SR.16, para. 62; Australia, A/C.6/58/SR.17, para. 31; Portugal, A/C.6/58/SR.18, para. 6; and separate comments of Mexico as well as Spain on file with the Special Rapporteur.

concept of "damage".[5] Some delegations noted that the objective of liability regimes was not actually allocation of loss but allocation of the duty to compensate for damage deriving from acts not prohibited by international law.[6] Indeed, it was suggested that familiar terms such as "damage" and "compensation" should be employed.[7] It was also observed that "allocation of loss" appeared to deviate from the "polluter pays" principle and the principle that the innocent victim should not be left to bear loss.[8] It was also felt that the main thrust of the mandate of the Commission was to address issues of liability and not issues concerning allocation of loss. However, given that the objective of the exercise is to address the loss to innocent victims, the difference between the two concepts — liability and allocation of loss — was considered to be not so very important.[9]

5. In developing any legal regime, emphasis was placed on the need for States to have sufficient flexibility to develop national or regional schemes of liability to address their particular needs as well as of victims of harm.[10] It was hoped that such an approach might aid States in selecting the most appropriate elements from the recently adopted instruments, keeping in view current developments in the ongoing negotiation of international liability regimes.[11] It was also felt that States had an obligation to ensure that some arrangement existed in national laws to guarantee equitable allocation of loss.[12]

6. A model of allocation of loss that would be general and residual in character received wide support.[13] It is felt that this would allow States to shape more detailed regimes for particularly special forms of hazardous activity.[14] In that connection, the general preference of States for civil liability regimes that are both sectoral and sensitive to the nature of the activity involved was noted.[15]

7. On the other hand, while acknowledging the need for effective liability regimes, it was felt that States were not very keen on the development of a general international legal regime on liability.[16] As such, the view that States had a duty under international law to enact a law providing for some fair and equitable system of allocation of loss within their domestic jurisdictions was contested. It was also noted that although a number of instruments had been elaborated in recent years, their impact was rather limited, as only a small number of States were parties to such instruments.[17] Noting that while States should continue to provide for liability

[5] See, for example, statement by Austria, A/C.6/58/SR.16, para. 43.
[6] See, for example, the statements of Austria, A/C.6/58/SR.16, para. 43 and Hungary, A/C.6/58/SR.18, para. 37.
[7] See, for example, the statement by Poland, A/C.6/58/SR.17, para. 36.
[8] See, for example, the statement by Mexico, A/C.6/58/SR.18, para. 40.
[9] See, for example, separate comments by Mexico on file with the Special Rapporteur.
[10] See, for example, statements by Norway, on behalf of the Nordic countries, A/C.6/58/SR.16, para. 52; Poland, A/C.6/58/SR.17, para. 37; United States, A/C.6/58/SR.18, para. 11.
[11] See, for example, the statement of Austria on file with the Special Rapporteur.
[12] See, for example, the statement by Netherlands, A/C.6/58/SR.16, para. 60.
[13] See, for example, the statements of the Netherlands, A/C.6/58/SR.16, para. 60; New Zealand, A/C.6/58/SR.16, paras. 61 and 64; Australia, A/C.6/58/SR.17, para. 31; Poland, A/C.6/58/SR.17, para. 37; and separate comments by Mexico on file with the Special Rapporteur.
[14] See, for example, the statement of New Zealand, A/C.6/58/SR.16, para. 61.
[15] See, for example, the statement of India, A/C.6/58/SR.68.
[16] See, for example, the statement of the United States, A/C.6/58/SR.18, paras. 12 and 13.
[17] See, for example, the statement of Austria on file with the Special Rapporteur.

of private operators in appropriate circumstances, it was pointed out that no particular international legal obligation existed to oblige them to do so. It was also stressed that the general approach to the international regulation of liability ought to proceed in careful negotiations with respect to particular sectors or regions.[18]

8. It was further noted that a successful international liability regime, whereby a victim could recover loss and damage from the operator directly, would require considerable harmonization of substantive as well as procedural law to enable claims from foreign nationals to be filed before national tribunals or other forums. In that connection doubt was expressed as to whether it would ever be possible to achieve a necessary level of harmonization.[19]

9. Several delegations welcomed the conclusions and findings contained in the first report of the Special Rapporteur,[20] but at least one delegation felt that it would be useful to investigate further the relative level of success or failure of the various instruments.[21] Another delegation desired investigation of national legislation and domestic and international practice.[22] A study to determine the extent to which recent environmental disasters were the result of a violation of the duty of prevention was also recommended.[23]

2. Scope

10. The need to clearly distinguish the scope of any liability regime dealing with acts not prohibited by international law from unlawful acts under the law of State responsibility was emphasized.[24] In that connection, support was affirmed for the principle that the legal regime to be considered by the Commission should be without prejudice to State responsibility under international law.[25] In addition, it was suggested that it should also be without prejudice to civil liability under national law or under rules of private international law.[26]

11. Given the relationship between prevention and liability as well as the need to maintain compatibility and uniformity, several delegations supported the idea that the scope of the topic should be the same as that of the draft articles on prevention of transboundary harm from hazardous activities.[27] It was further noted that the

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[18] See, for example, the statement of the United States of America, A/C.6/58/SR.18, paras. 12 and 13.

[19] See, for example, separate comments of the United Kingdom on file with the Special Rapporteur.

[20] See, for example, the statements of the United Kingdom, A/C.6/58/SR.18, para. 33; Poland, A/C.6/58/SR.17, para. 36; and Hungary, A/C.6/58/SR.18, para. 37.

[21] See, for example, the statement of the United Kingdom, A/C.6/58/SR.18, para. 33.

[22] See, for example, the statement of China, A/C.6/58/SR.19, para. 42.

[23] See, for example, the statement of Nigeria, A/C.6/58/SR.14, paras. 14 and 15.

[24] See, for example, the statement of Norway (on behalf of the Nordic countries), A/C.6/58/SR.16, para. 50 and statement of Austria on file with the Special Rapporteur.

[25] See, for example, statements of India, A/C.6/58/SR.16, para. 69; Greece, A/C.6/58/SR.17, para. 23; and Australia, A/C.6/58/SR.17, para. 31.

[26] See, for example, statements of India, A/C.6/58/SR.16, para. 69; Australia, A/C.6/58/SR.17, para. 1; and China, A/C.6/58/SR.19, para. 43.

[27] See, for example, statements of India, A/C.6/58/SR.16, para. 68; Poland, A/C.6/58/SR.17, para. 36; and separate comments of Spain on file with the Special Rapporteur.

same threshold of "significant harm" as defined in the draft articles on prevention should be maintained for triggering liability.[28]

12. Several delegations stressed that any future regime should guarantee, to the maximum, compensation for harm caused to individuals and the environment.[29] Support was expressed for the definition of "harm" that would include any loss to persons and property, including elements of State patrimony and natural heritage as well as environment within national jurisdiction.[30] On the other hand, it was noted that since damage could not be physically traced back to the operator, if strict liability was preferred, a broader definition of environmental harm should be avoided. Moreover, effective application of liability provisions presupposed that the term "damage" should be narrowly defined.[31]

13. The non-inclusion of the global commons in the draft articles on prevention was considered a step backward.[32] While acknowledging that the scope of the present work should be limited to that of the draft articles on prevention, some delegations regretted that it would exclude damage to the global commons[33]. Given the importance of that aspect of the topic, it was suggested that harm to the global commons should be considered separately[34] at some future point.[35]

3. Role of the operator

14. In any scheme covering either liability or a regime on allocation of loss, there was unanimous support for assigning liability first to the operator. In that regard, several delegations agreed with the view of the Special Rapporteur that the person most in command or control of the activity should bear the primary duty for redressing any harm caused.[36] In justification, it was observed that in most cases the operator was the main beneficiary of the activity, the creator of the risk and was in the best position to manage it.[37] In addition, it was emphasized that that policy was in line with the "polluter pays" principle.[38] It was also suggested, on the basis of the 1999 Basel Protocol on Liability and Compensation for Damage resulting from

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[28] See, for example, statements of Germany, A/C.6/58/SR.14, para. 62; Austria, A/C.6/58/SR.16, para. 44; Greece, A/C.6/58/SR.17, para. 24; Poland, A/C.6/58/SR.17, para. 36; and Argentina, A/C.6/58/SR.19, para. 87.

[29] See, for example, statements of Belarus, A/C.6/58/SR.16, para. 32; Australia, A/C.6/58/SR.17, para. 30; and separate statement of Mexico on file with the Special Rapporteur.

[30] See, for example, the statement of Greece, A/C.6/58/SR.17, para. 24.

[31] See, for example, the statement by Germany, A/C.6/58/SR.14, para. 62.

[32] See, for example, the comments of Spain on file with the Special Rapporteur.

[33] See, for example, the statement of Poland, A/C.6/58/SR.17, para. 37.

[34] See, for example, the statement of New Zealand, A/C.6/58/SR.16, para. 63; Mexico, A/C.6/58/SR.18, para. 41.

[35] See, for example, the statement of New Zealand, A/C.6/58/SR.16, para. 63 and separate comments of Spain on file with the Special Rapporteur.

[36] See, for example, statements by India, A/C.6/58/SR.16, para. 69; Australia, A/C.6/58/SR.17, para. 31; Poland, A/C.6/58/SR.17, para. 36; Netherlands, A/C.6/58/SR.16, para. 62; Norway (on behalf of Nordic countries), A/C.6/58/SR.16, para. 52; China, A/C.6/58/SR.19, para. 43; New Zealand, A/C.6/58/SR.16, para. 62; Greece, A/C.6/58/SR.17, para. 23; and Mexico, A/C.6/58/SR.18, para. 41; and separate comments of Spain on file with the Special Rapporteur.

[37] See, for example, the statement of the Netherlands, A/C.6/58/SR.16, para. 62.

[38] See, for example, statements of Norway (on behalf of the Nordic countries), A/C.6/58/SR.16, para. 52; Greece, A/C.6/58/SR.17, para. 23; and Mexico, A/C.6/58/SR.18, para. 41.

Transboundary Movements of Hazardous Wastes and their Disposal,[39] that the term "operator" should be broadly defined to include all persons exercising control of the activity.[40]

(a) Procedural and substantive requirements of the operator

15. It was acknowledged that specific procedural and substantive requirements which States imposed or might impose on operators might vary from activity to activity.[41] Nevertheless, it was suggested on the one hand that the model for allocation of loss that a State should provide for, should consist of a set of procedural minimum standards. These should address such issues as standing to sue, jurisdiction of domestic courts, designation of applicable domestic law, and recognition and enforcement of judgements. They should also encompass such substantive minimum standards as definitions, general principles (including that the victim, to the extent possible, should not be left to bear loss), the concept of damage, the causal connection between damage and the activity causing damage, basis of liability (fault liability, strict liability, absolute liability), identification of persons liable, including the possibility of multiple tiers of liability, limits of liability (time limits, financial limits) and coverage of liability.[42]

16. In addition, the requirement to obtain requisite insurance coverage[43] as well as other financial guarantees[44] was noted. Some delegations suggested that insurance coverage should be mandatory.[45] However, in view of the diversity of legal systems and differences in economic conditions, other delegations advocated flexibility with regard to these requirements.[46] It was also pointed out that an effective insurance system would require wide participation by potentially interested States.[47] Moreover, the point was made that to satisfy requirements of the insurance industry, operator liability might have to be limited to established ceilings.[48]

17. Further, delegations stressed the importance of national systems obliging operators to equip themselves to take prompt, effective action in order to minimize harm. This would require the operator to institute contingency, notification and other plans for responding to incidents that carried a risk of transboundary harm.[49] Simultaneously, improvement of public access to information as well as development of mechanisms for public participation was also desired.[50] The value of the precautionary principle and the obligation of States to take all appropriate

[39] For the text, see UNEP/CHW.5/29.

[40] See, for example, the statement of Mexico, A/C.6/58/SR.18, para. 41.

[41] See, for example, the statement of Australia, A/C.6/58/SR.17, para. 30.

[42] See, for example, the statement of Portugal, A/C.6/58/SR.18, para. 6; and statements of the Netherlands and New Zealand on file with the Special Rapporteur.

[43] See, for example, statements of Australia, A/C.6/58/SR.17, para. 30; Israel, A/C.6/58/SR.17, para. 41; Hungary, A/C.6/58/SR.18, para. 37; Mexico, A/C.6/58/SR.18, para. 41; and Romania, A/C.6/58/SR.19, para. 59.

[44] See, for example, the statement of Mexico, A/C.6/58/SR.18, para. 41.

[45] See, for example, the statement of Romania, A/C.6/58/SR.19, para. 59, and the statement of Israel as well as separate comments of Spain on file with the Special Rapporteur.

[46] See, for example, the statement of China, A/C.6/58/SR.19, para. 43.

[47] See, for example, the statement of Italy, A/C.6/58/SR.17, para. 28.

[48] See, for example, separate comments of Spain on file with the Special Rapporteur.

[49] See, for example, statements of Australia, A/C.6/58/SR.17, para. 30; and Romania, A/C.6/58/SR.19, para. 59.

[50] See, for example, the statement of Germany on file with the Special Rapporteur.

measures to prevent transboundary harm were stressed as a supplement to the strict civil liability of the operator.[51]

18. On the other hand, preference was expressed for a simpler scheme. It was suggested that it would be sufficient if the proposed regime on allocation of loss broadly specified the obligation of States to provide, in their national legislation, for rules governing liability of the operator, including the duty to pay compensation, subject to a minimum threshold for triggering liability.[52]

(b) The basis and limits of allocation of loss to the operator

19. Concerning the basis of liability of the operator, several delegations spoke in favour of a strict civil liability regime.[53] It was noted that such an approach was in line with various international agreements on liability,[54] as well as with the "polluter pays" principle.[55] In relation to exceptions to strict liability, it was suggested that the liability of the operator should be subject to usual exceptions, including those concerning armed conflict or natural disasters.[56]

20. However, one delegation cautioned that strict liability should be approached with caution. It was pointed out that although it was well recognized in domestic legal systems, it could not be affirmed that it was well accepted or understood as a desirable policy in the context of transboundary harm.[57] Another delegation doubted whether international law should intervene in apportioning loss among the various actors. In principle, there was a preference among some delegations to leave resolution of the matter to domestic legal systems.[58]

21. Support is also expressed for limits on the liability of the operator. It was noted that such limits were necessary since the use of technology capable of causing transboundary harm might have serious consequences for the functioning of economic and other social systems, and would affect substantial individual interests.[59] Support was expressed in that connection for the imposition of time limits within which legal action could be initiated.[60] It was pointed out, however, that time or financial limits should only be available to the operator if (a) such limits were necessary to ensure that coverage of liability was available at reasonable cost; and (b) international or domestic arrangements provided for supplementary sources of funding.[61]

22. Concerning the level of financial limits, it was pointed out that ceilings needed to be set at significant but reasonable levels, in order to reflect the principle that the

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[51] See, for example, the statement of Germany, A/C.6/58/SR.14, para. 62).

[52] See, for example, the statement of Israel, A/C.6/58/SR.17, para. 39.

[53] See, for example, statements of Germany, A/C.6/58/SR.14, para. 62; Belarus, A/C.6/58/SR.16, para. 32; New Zealand, A/C.6/58/SR.16, para. 62; India, A/C.6/58/SR.16, para. 68; Hungary, A/C.6/58/SR.18, para. 37; Mexico, A/C.6/58/SR.18, para. 41; Netherlands, statement and separate comments of Spain on file with the Special Rapporteur.

[54] See, for example, the statement of Belarus, A/C.6/58/SR.16, para. 32.

[55] See, for example, statements of Norway (on behalf of the Nordic countries), A/C.6/58/SR.16, para. 52; and Mexico, A/C.6/58/SR.18, para. 41.

[56] See, for example, the statement of Mexico, A/C.6/58/SR.18, para. 41.

[57] See, for example, the statement of Cyprus, A/C.6/58/SR.19, para. 68.

[58] See, for example, the statement of Israel, A/C.6/58/SR.17, para. 40.

[59] See, for example, the statement of Belarus, A/C.6/58/SR.16, para. 32.

[60] See, for example, the statement of Mexico, A/C.6/58/SR.19, para. 46.

[61] See, for example, the statement of the Netherlands on file with the Special Rapporteur.

operators, being the beneficiaries of the activity, should internalize, to the extent possible, associated costs.[62] The point was also made that financial limits would make insurance and additional mechanisms feasible.[63]

(c) Causation

23. As complicated scientific and technological elements were associated with hazardous activities to lessen the consequent burden placed on victims of harm caused by such activities, several delegations did not prefer strict proof of causal connection to establish liability.[64] It was stated that liability should arise once harm could reasonably be traced to the activity in question.[65] It was also suggested that, subject to a waiver clause, there should be presumption of a reasonable causal link between the actions of the operator and the injurious consequences.[66] It was even noted that the burden of proving a causal link between the activity and the damage should not fall on the victim.[67] The point was made, however, that the application of the "test of reasonableness" might require some adaptation or clarification, given the fact that different types of hazardous activities existed.[68]

(d) Multiple sources of harm

24. Support was expressed for a provision to be made for joint and several liability for cases where damage could be traced to several operators or when damage resulted from more than one activity.[69]

4. The role of the State

25. State liability for failure to discharge its duty to exercise due diligence in controlling sources of harm in its territory would in effect be based on State responsibility for wrongful acts under customary law. Accordingly, it was noted that a regime based on State liability would add very little to the law already in force.[70] On the other hand, it was considered unfair to place the primary liability on the State in whose territory the hazardous activity was located to compensate for every incident of transboundary harm traced to such an activity. It was emphasized that, in most cases, the activity was chiefly conducted by and primarily benefited an operator.[71] Thus, some delegations noted that State liability was largely an exception and applicable only as provided for in few conventions.[72] It was noted that, in principle, relevant losses should be borne by the operator or shared by the

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[62] See, for example, the statement of New Zealand on file with the Special Rapporteur.
[63] See, for example, the statement of Mexico, A/C.6/58/SR.18, para. 41.
[64] See, for example, the statements of Austria, A/C.6/58/SR.16, para. 42; Norway (on behalf of the Nordic countries), A/C.6/58/SR.16, para. 52; Mexico, A/C.6/58/SR.18, para. 41; and China, A/C.6/58/SR.19, para. 43.
[65] See, for example, the statements of Norway (on behalf of Nordic countries), A/C.6/58/SR.16, para. 52; and Mexico, A/C.6/58/SR.18, para. 41.
[66] See, for example, the statement of China, A/C.6/58/SR.19, para. 43.
[67] See, for example, the statement of Mexico, A/C.6/58/SR.18, para. 41.
[68] See, for example, the statement of Poland, A/C.6/58/SR.17, para. 36.
[69] See, for example, the statement of Mexico, A/C.6/58/SR.18, para. 41.
[70] See, for example, the statement of Greece, A/C.6/58/SR.23, para. 23.
[71] A/C.6/58/SR.23.
[72] See, for example, the statement by India, A/C.6/58/SR.16, para. 70.

operator and other actors.[73] This was in contrast to the view which was also expressed that if strict liability of the State was established as the overriding principle, States themselves would be obliged to develop formulas for allocation of loss and mechanisms for funding.[74] Some favoured linking strict liability of the operator with some residual compensation regime involving the State. It was maintained that a system based solely on the liability of the operator or other actors might not be sufficient to protect victims from loss.[75]

(a) The nature and extent of State involvement and funding

26. Different scenarios concerning the creation of supplementary funding envisaging a tier system were offered involving different actors, including the State. These involved some degree of liability of the State in cases where the operator was unable or unwilling to fully cover loss,[76] was insolvent, could not be identified,[77] or in certain well-defined cases where the liability of the operator was limited by insurance obligations[78] or compensation was inadequate.[79] It was also asserted that in the case where the operator was unable or unwilling to cover such loss, the regime should include "absolute State liability".[80]

27. The involvement of the State in the scheme of allocation of loss on a supplemental basis was justified on the ground that the activity to commence required the authorization of the State and was otherwise beneficial to it.[81] In any case it was deemed essential to give effect to the principle that the victim should not be left to bear the loss unsupported.[82] Some delegations sought to establish a closer nexus between the operator and the State. They suggested that harm not covered by the operator should be covered by the State to which that operator belonged[83] or the State under whose jurisdiction or control the activity was carried out.[84] It was felt in that connection that the State which was affected by the hazardous activity should not be burdened by requiring it to contribute to a scheme on allocation of loss.[85] In

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[73] See, for example, the statements of Norway (on behalf of the Nordic countries), A/C.6/58/SR.16, para. 52; Netherlands, A/C.6/58/SR.16, para. 62; India, A/C.6/58/SR.16, para. 70; Greece, A/C.6/58/SR.17, para. 23; Australia, A/C.6/58/SR.17, para. 31; and Hungary, A/C.6/58/SR.18, para. 37.

[74] See, for example, the statement of Norway (on behalf of the Nordic countries), A/C.6/58/SR.16, para. 53.

[75] A/C.6/58/SR.16, para. 52.

[76] See, for example, the statements of Norway (on behalf of the Nordic countries), A/C.6/58/SR.16, para. 52; Netherlands, A/C.6/58/SR.16, para. 62; Greece, A/C.6/58/SR.17, para. 23; Australia, A/C.6/58/SR.17, para. 31; Hungary, A/C.6/58/SR.18, para. 37; and Romania, A/C.6/58/SR.19, para. 59.

[77] See, for example, the statement of Greece, A/C.6/58/SR.17, para. 23.

[78] See, for example, the statement of India on file with the Special Rapporteur.

[79] See, for example, the statement of Australia, A/C.6/58/SR.17, para. 31.

[80] See, for example, the statement of Norway (on behalf of the Nordic countries), A/C.6/58/SR.16, para. 52.

[81] See, the statement of Australia, A/C.6/58/SR.17, para. 31.

[82] See the statement of Norway (on behalf of the Nordic countries), A/C.6/58/SR.16, para. 53.

[83] See, for example, the statement of Belarus, A/C.6/58/SR.16, para. 32; and separate comments of Spain on file with the Special Rapporteur.

[84] See, for example, the statement of the Netherlands on file with the Special Rapporteur.

[85] See, for example, separate comments of Spain on file with the Special Rapporteur.

addition to providing back-up funding,[86] it was proposed that the State should be obliged to do its utmost to enact legislation designed to prevent uncovered losses and to exercise due diligence with a view to ensuring effective enforcement thereof.[87]

28. Differing from this perspective was the view that State liability should be designated only as a last resort.[88] Accordingly it was argued that residual State liability should be provided for only in cases where the operator did not cover harm and supplementary sources of funding[89] were insufficient or otherwise unavailable.[90] While showing willingness to consider proposals for supplementary funding in which a State could participate, some States pointed out that not all States authorizing hazardous activities might have the means to pay compensation resulting from such a residual liability.[91] The view was also expressed that that residual liability of a State should consist principally in taking preventive measures and establishing funds for the equitable allocation of loss, rather than assuming the liability itself in all cases in which the responsible party had defaulted.[92] It was also considered unacceptable for public funds to be used to compensate for loss that should be allocated to the operator. State funds, in that view, should be earmarked only if necessary to meet emergencies and contingencies arising from significant hazardous activities.[93] It was indicated that where State itself was the operator or was directly and effectively related to the harmful operation, it should be treated at par with a private actor for the purpose of allocation of loss.[94]

(b) Types of supplementary sources of funding

29. Several means of establishing an additional funding mechanism were noted: contributions from the private or public sector;[95] from beneficiaries of the activity in question,[96] including industry and corporate funds on a national, regional or international basis;[97] or from the States concerned,[98] including earmarked State funds.[99] It was further suggested that such funds should be created from contributions from States, relevant national and international organizations, non-

[86] See the statements of New Zealand on file with the Special Rapporteur; and the statement of Hungary, A/C.6/58/SR.18, para. 37.

[87] See, the statement of Israel, A/C.6/58/SR.17, para. 41. See also separate comments of Spain on file with the Special Rapporteur.

[88] See the statement of Romania, A/C.6/58/SR.19, para. 59.

[89] See, for example, the statement of the Netherlands on file with the Special Rapporteur.

[90] See, for example, the statement of New Zealand on file with the Special Rapporteur, and the statement of Norway (on behalf of the Nordic countries), A/C.6/58/SR.16, para. 53.

[91] See, for example, the statement of India, A/C.6/58/SR.16, paras. 68 and 70.

[92] See, for example, the statement of China, A/C.6/58/SR.19, para. 43.

[93] See, for example, separate comments of Spain on file with the Special Rapporteur.

[94] See, for example, the statement of Israel, A/C.6/58/SR.17, para. 41.

[95] See, for example, the statement of the Netherlands on file with the Special Rapporteur.

[96] See, for example, statements of Norway (on behalf of the Nordic countries), A/C.6/58/SR.16, para. 53; Mexico, A/C.6/58/SR.18, para. 41.

[97] Statement of New Zealand on file with the Special Rapporteur.

[98] See, for example, the statement of Belarus, A/C.6/58/SR.16, para. 32.

[99] See, for example, the statement of Norway (on behalf of the Nordic countries), A/C.6/58/SR.16, para. 53).

governmental organizations and insurance based on mandatory contributions by operators belonging to the same sector of operations.[100]

5. Coverage of harm to the environment

30. The definition of "damage" eligible for compensation is referred to in many interventions. In that connection it was noted that the proposal made by the Special Rapporteur provided a good working basis, namely damage to persons and property, as well as damage to the environment or natural resources within the jurisdiction or in areas under the control of a State.[101] Further, there was support for reimbursement of costs incurred by way of implementation of measures for reinstatement of damaged environment.[102]

31. While accepting the proposed scope as put forward by the Special Rapporteur, it was felt that in certain situations restoration of the environment was not possible and quantification difficult. Thus, it was noted that there was merit in not limiting compensation for harm to the environment to the costs of measures of restoration but to extend it to include loss of intrinsic value.[103] Concerning coverage of economic loss, some delegations stated that the right to compensation should include economic loss suffered where a person's ability to derive income was affected by an activity[104] and should include loss of profit.[105] The concept of economic loss, according to another view, should extend to loss incurred as a direct result of the perceived risk of physical consequences flowing from an activity even without those physical consequences actually occurring.[106]

32. It was suggested that issues concerning the environment per se should not be left out and should be considered at a later stage, even if they were not dealt with in the present context.[107] Under another view, the question was best treated in a framework concerned with the environment and not within the work schedule of the Commission.[108]

6. Final form of work on the topic

33. Any discussion of the final form of the Commission's work on the topic was considered to be premature. On the other hand it was deemed useful for the Commission to decide from the outset on the form, for example, whether it aimed to formulate a series of recommendations for States or to develop a general model instrument that could be applied in the absence of any specific treaty regime. In the case of the latter, it would be difficult for the Commission to move beyond a preliminary text that would do no more than assist States in future negotiations.[109]

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[100] See, for example, separate comments of Spain on file with the Special Rapporteur.
[101] See, for example, the statement of Austria, A/C.6/58/SR.16, para. 44.
[102] Statement of the Netherlands on file with the Special Rapporteur.
[103] See, for example, the statement of New Zealand, A/C.6/58/SR.16, para. 63.
[104] See, for example, the statement of New Zealand, A/C.6/58/SR.16, para. 64, and Norway (on behalf of the Nordic countries), A/C.6/58/SR.16, para. 52.
[105] See, for example, the statement of Greece, A/C.6/58/SR.17, para. 24.
[106] See, for example, the statement of New Zealand, A/C.6/58/SR.16, para. 64.
[107] See, for example, the statement of Mexico, A/C.6/58/SR.18, para. 43.
[108] See, for example, the statement of Israel, A/C.6/58/SR.17, para. 42.
[109] See, for example, the statement of Italy, A/C.6/58/SR.17, para. 28.

34. The final form on liability, according to some, should not be different from that of the draft articles on prevention, and both aspects could be addressed in a single instrument.[110] In that connection, some delegations expressed preference for a convention.[111] Such a composite draft might treat regulation of the prevention of harm and provide for corrective measures to be taken, especially for the elimination of the harm and the compensation of those affected.[112] On the other hand, the conclusion of a protocol on liability to a convention on prevention, a suggestion put forward by the Special Rapporteur at the fifty-fifth session of the Commission, was not favoured.[113]

35. Some delegations favoured a soft law approach.[114] A comprehensive study of the existing law with a set of recommendations, for example, was considered a realistic and achievable goal.[115] It was also observed that, as the solution would depend on the development of specific liability regimes in the future, the final outcome could therefore take the form of a "checklist" of issues, which could be taken into consideration in future negotiations on the establishment of liability regimes for specific activities.[116] Others favoured guidelines or model rules for States.[117] Whatever form the final outcome of the work of the Commission on liability might take, some delegations saw the importance of including appropriate dispute settlement arrangements.[118]

B. General conclusions of the Special Rapporteur

36. The debate in the Sixth Committee of the General Assembly ran along lines which were in most respects similar to those of the debate that took place earlier within the Commission. However, some general conclusions appear to emerge:

(1) The legal regime that the Commission needs to fashion should be general and residuary. It should be sufficiently general to leave room and flexibility to States to develop more specific liability regimes bilaterally or regionally, governing individual hazardous activity or activities within a defined sector of operation of such activities. It should be residual in that it would not be applicable in the case where provisions of a bilateral, multilateral or regional agreement also apply. It would also safeguard the relevant rules of State responsibility and not duplicate or be in conflict with the operation of civil liability regimes within national jurisdictions.

(2) The scope of the present exercise of the Commission should be coterminous with the scope of the draft articles on prevention of transboundary harm

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[110] See, for example, the statement of the Netherlands on file with the Special Rapporteur and statements of New Zealand, A/C.6/58/SR.16, para. 64, and Portugal, A/C.6/58/SR.18, para. 5.

[111] See, for example, statements of Belarus, A/C.6/58/SR.16, para. 32; Norway (on behalf of the Nordic countries), A/C.6/58/SR.16, para. 52; Mexico, A/C.6/58/SR.18, para. 43.

[112] See, for example, the statement of Belarus, A/C.6/58/SR.16, para. 32.

[113] See, for example, the statement of the United States, A/C.6/58/SR.16, para. 32.

[114] See, for example, the statement of Romania, A/C.6/58/SR.19, para. 59.

[115] See, for example, the statement of the United Kingdom, A/C.6/58/SR.18, para. 34.

[116] See, for example, the statement of Austria, A/C.6/58/SR.16, para. 45.

[117] See, for example, statements of Poland, A/C.6/58/SR.17, para. 37; and Israel, A/C.6/58/SR.17, para. 43.

[118] See, for example, the statements of the Netherlands, A/C.6/58/SR.16, para. 62; New Zealand, A/C.6/58/SR.16, para. 16; Cyprus, A/C.6/58/SR.19, para. 58.

from hazardous activities which the Commission adopted in 2001 and forwarded to the General Assembly for further action.[119] That means there would be no need to reopen the issues concerning the nature of activities covered or the designation of threshold of harm, that is, "significant harm" as the trigger for bringing the principles of allocation of loss into play.

(3) It is recognized that it is not always possible to prohibit or avoid engaging in hazardous or significant risk-bearing activities because they are crucial for economic development and are beneficial to society in general. However, States are under an obligation to authorize them only under controlled conditions and strict monitoring while discharging their duty of prevention of transboundary harm.

(4) It is possible that, through no fault of the State which has fully discharged its duties of prevention, damage may still occur. In such an eventuality, innocent victims who have no part in the operation of the activity or otherwise are not direct beneficiaries of the activity should not be allowed to bear the loss, as far as possible.

(5) Any scheme of allocation of loss should place the duty of compensation first on the operator. The operator is in control of the activity and is also its direct beneficiary. This approach would adequately reflect the "polluter pays" principle, in particular the policy of internalizing the costs of operation. Accordingly, the operator is required to obtain the necessary insurance coverage and show appropriate financial guarantees. It is also agreed that the operator's liability may be limited. In this regard, limits could be envisaged both for financial liability and for the period within which the claims for compensation could be entertained. Limited financial liability is justified on the ground that it would help the operator to obtain the necessary insurance for the high-risk activity. It would also allow operators to come forward to undertake the risky ventures without fear of total financial bankruptcy.

(6) In addition, the operator is also required to equip himself with the necessary contingency plans and emergency preparedness, including mechanisms for notification of emergency and other plans or safety measures expected of a reasonable and prudent person.

(7) The principle of the limited financial liability of the operator has to be balanced against the basic policy of not leaving the innocent victim as far as possible to bear the loss suffered. The necessary balance could be achieved by mandating compensation of the victim through supplementary sources of funding. Several international conventions and State practice provide for this. Supplementary funding could be established through contributions from direct beneficiaries, operators engaged in similar activities, other public and private agencies and from funds established by competent international organizations.

(8) The definition of "damage" eligible for compensation can cover damage to persons and property, including elements of State patrimony and natural heritage, as well as damage to the environment or natural resources within the jurisdiction or in areas under the control of a State. A number of States emphasized that the concept of damage should be sufficiently broad to encompass damage to environment per se. In their view damage to global commons should not be left

[119] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 and corrigendum* (A/56/10 and Corr.1), para. 97.

uncovered. The question of covering damage to the environment per se in areas beyond national jurisdiction or global commons has also been the continuing concern of some members of the Commission. It is important therefore to address this issue with an open mind.

(a) First, there is no commonly agreed definition of a global commons. The reference, however, from the conservative point of view, is to the high seas beyond national jurisdiction, including the deep seabed and the ocean floor and the airspace above; outer space; the moon and other celestial bodies; and, with some possible disagreement, to Antarctica, where under article IV of the 1959 Antarctic Treaty,[120] "no new claim, or enlargement of an existing claim, to territorial sovereignty in Antarctica shall be asserted while the present Treaty is in force." As is well known, the 1982 United Nations Convention on the Law of the Sea[121] deals with oceans, including the environment thereof, in as comprehensive a basis as possible. The International Seabed Authority is actively engaged in developing regulations for preventing and controlling any possible environmental threats to the deep seabed and the ocean floor due to prospecting and exploration for deep seabed resources, in particular manganese nodules.

Further, since much of the pollution of the sea is from land-based sources, it is regulated through regional treaties. Mention could also be made of several of the International Maritime Organization Conventions regulating oil spills and dumping of wastes. There is also the 1963 Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water.[122] Issues relating to the Antarctic environment are the subject of regular consultation among the Antarctic Treaty Consultative Parties. Moreover, the United Nations Committee on the Peaceful Uses of Outer Space[123] is concerned about space debris and other related environmental issues arising from the space activities of States. Drawing attention to these Conventions and activities, Tomuschat came to the conclusion that there was no justification for dealing with the problems arising from any one or more of these Conventions within the International Law Commission under a new topic of global commons. Any such study, he warned, would have to be only "at a high level of abstractness"[124] and would not take the matters any further than the Stockholm and Rio declarations. He also felt that in essence a study on protection of global commons would not be any different from a study on transboundary harm, as the sources of pollution were essentially land-based. Accordingly he felt that "it would be extremely artificial, if not impossible, to draw up different rules of prevention according to the identity of the potential victim objects".[125]

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[120] Concluded at Washington on 1 December 1959; United Nations, *Treaty Series*, vol. 402, p. 71.

[121] Concluded at Montego Bay on 10 December 1982; United Nations, *Treaty Series*, vol. 1833, p. 3.

[122] Done at Moscow on 5 August 1963; United Nations, *Treaty Series*, vol. 480, p. 43.

[123] Established in 1959 pursuant to General Assembly resolution 1472 (XIV) to review the scope of international cooperation in the peaceful uses of outer space, to devise programmes in this field to be undertaken under United Nations auspices, to encourage continued research and the dissemination of information on outer space matters, and to study legal problems arising from the exploration of outer space.

[124] Christian Tomuschat, "Global Commons", Outlines Prepared by Members of the Commission on selected topics of international law, *Yearbook ... 1993*, vol. II (Part One), p. 245, at p. 247, para. 19.

[125] Ibid., para.20. Tomuschat, however, noted that by including in its work programme the global commons as a new topic, the Commission would necessarily duplicate work under injurious

On the other hand, there is perhaps room to improve upon each of these instruments, as most of them address damage or harm to persons and property and are not concerned with harm to global commons as such. Mahnoush Arsanjani and Michael Reisman in their illuminating analysis of the problem aptly noted this point.[126] They have pointed out that the real but more modest efforts to focus upon liability for injury to global commons began only with principle 21 of the Stockholm Declaration and principle 2 of the Rio Declaration. But these were still hortatory in nature, requiring a more concerted effort on the part of States to negotiate more concrete obligations. The 1988 Convention on the Regulation of Antarctic Mineral Resource Activities[127] provided liability for damage to "the Antarctic environment or dependent or associated ecosystems", arising from Antarctic mineral resources activities. Article 1, paragraph 15, of the Convention defined "damage" to mean "any impact on the living or non-living components of that environment or those ecosystems, including harm to atmospheric, marine or terrestrial life, beyond that which is negligible or which has been assessed and judged to be acceptable pursuant to this Convention." The Minerals Convention never entered into force and was superseded by the 1991 Protocol on Environmental Protection to the Antarctic Treaty, which provided the 50-year moratorium on mineral exploration and exploitation in Antarctica. It anticipates an annex dealing with liability, which is still under negotiation.[128]

Similarly the 1993 Lugano Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment,[129] adopted by the Council of Europe, is notable for its emphasis on compensation and for its inclusion of loss or damage by impairment of the environment in the definition of damage. However, this Convention also did not come into force, and does not appear likely to do so.

Questions of the liability of the State and other problems such as establishing the causal connection, standing to sue and quantification of damage are some of the stumbling blocks that stand in the way of constructing a liability regime for the global commons.[130] Arsanjani and Reisman conclude on a perceptive note, when they observe that "the problems in constructing a viable regime for the protection of the global commons that incorporates a liability component are, as we have seen, formidable. But the consequences of not fashioning such a regime — and not doing it soon — may well constitute the most profound common threat to humanity in the twenty-first century".[131]

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consequences and it would seem infinitely preferable to bear in mind the need of the global commons for protection in establishing a code of duties of prevention; para. 21.

[126] Mahnoush Arsanjani and Michael Reisman, "The Quest for An International Liability Regime for the Protection of Global Commons", in Karel Wellens (ed.), *International Law: Theory and Practice* (1998), 469-492 at pp. 469-473.

[127] *27 ILM* (1988), 859.

[128] For the text of the 1991 Protocol to the Antarctic Treaty on Environmental Protection concluded at Madrid, see *30 ILM* (1991), 1451.

[129] *32 ILM* (1993), 128.

[130] For a clear presentation of the difficulties on each of these counts (for example, elements relevant to the formulation of a regime on liability for harm to the global commons, namely, threshold of harm, assessment of harm, identification of the injured party, jurisdictional questions, and finally the question of compensation), see Arsanjani and Reisman, supra note 127, pp. 473-482.

[131] Arsanjani and Reisman, supra note 127, p. 488.

A more integrated approach to the regulation of environment of the global commons, with focus on duties *erga omnes*, may, under the circumstance as suggested by Yamada, be desirable.[132] But to bring that effort within the compass of present exercise may not only delay the final product but, more importantly, may even fundamentally affect the economy of the present project.

(b) The above analysis still leaves out one other dimension to the problem of harm to the environment, namely harm caused to the global commons by activities coming within the scope of the present articles. In the case of a transboundary harm traversing all the State boundaries and affecting the global commons or environment per se in areas beyond national jurisdiction, it appears reasonable to allow for claims for restoration and any response measures taken or to be taken.

The question as to who may be allowed the necessary legal standing to bring such a claim, however, remains to be resolved. As one option, any entity which can substantiate the claim may be allowed to sue the operator. On a more limited basis, only States may be allowed to sue other States which authorized the activity. This is justified on the basis of the notion that protection of the global commons is an *erga omnes* obligation.[133]

Nevertheless, the formidable difficulties in establishing the causal connection, even under a liberalized scheme of inferences or rebuttable presumptions involving reversal of burden of proof, for damage affecting deep ocean areas, for example, cannot be underestimated. Ocean currents and winds could disperse the damage faster than people could reach it to study the extent of the damage. Other significant factors might intervene and the causal connection could become very evanescent. In the absence of established baselines for the preservation of the global commons, it may be extremely difficult to measure the extent and nature of the damage.

Nevertheless a suitable provision defining damage as including damage to environment per se could still be useful for progressive development of the law. This may become very important in the course of time, as States expand natural resources exploitation into the marine spaces within their national jurisdiction. The danger of transboundary harm from such activities is as real to the areas beyond national jurisdiction as it is to areas within the national jurisdiction of one or more neighbouring States. There appears therefore to be a good case for expanding the definition of damage as noted above to cover damage to the environment and natural resources in areas beyond national jurisdiction.

(9) Another equally well-canvassed issue is the role of the State in any scheme of allocation of loss. It deserves our careful attention. The State which authorized the risk-bearing activity has its own duties and responsibilities with respect to preventing transboundary harm. For the purpose of the present exercise, it is assumed it has fully discharged those duties, failing which it would be open to invoking of the relevant rules of State responsibility. In the case where damage occurs despite taking measures of prevention, it is possible that compensation to be paid to the victims may fall short of the actual loss because of the limits imposed on

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[132] C. Yamada, "Rights and Duties of States for the Protection of the human environment", *Yearbook ... 1993*, vol. II (Part One), p. 247, at p. 248 paras. 16-17.

[133] See J. I. Charney, "Third State Remedies for Environmental Damage to the World's Common Spaces", in Francesco Francioni and Tullio Scovazzi, *International Responsibility for Environmental Harm* (1991), pp. 149-177, at p. 157.

the liability of the operator under national law. In such cases, several States have provided for supplementary national funding or made ex-gratia payments.

However, the issue in the present context is whether it is desirable to impose upon the State an obligation to earmark funds to meet the shortfall, if any, as far as possible. Different justifications could be offered to bring the State into the scheme. Some prefer to view this as a subsidiary or residuary obligation, the primary obligation being that of the operator or other private entities having a share or interest in the profit-generating activity. Others would like to view it as a social or moral obligation of the State towards the victims. Some others reject the very idea of imposing any obligation on the State to provide or assume subsidiary liability. At the most, it is suggested that the State may be obliged to ensure that necessary funds for compensation are in fact available. This may be done in several ways, only one of which is related to the introduction of some supplementary funding with an option for the State to make a suitable contribution.[134]

There is growing support for the idea of bringing the State into the scheme of supplementary funding. On the other hand there is also a strong reluctance among some States to accept any subsidiary liability for the operator's failure.

It is suggested therefore that the share of the State should be treated as a contribution to the supplementary funding in the same manner as contributions that may be required from other actors, like international organizations. It is for this reason that the legal regime to be constructed is better designated as a scheme for the allocation of loss. In addition, the scheme is suggested as a progressive development of law. For many of its elements, other than the liability of the operator or the person in charge of the activity at the relevant point of time when the incident occurs, are not treated uniformly, consistently or in the same manner.

There are also differing views on how detailed the scheme of allocation of loss and on how specific and elaborate its definition of compensable damage should be. Even on the question of proof of damage and the necessary causal connection, there may be variation in views. Many States, but not all, endorsed the employment of a relatively flexible standard with a view to reducing the burden of proof for the victims. Some even suggested that the burden of proof should be reversed or that provision should be made for a presumption of causal connection, which then could be open to rebuttal by the operator. Some of the recently concluded conventions have provisions dealing with these issues, and compromises arrived at by majority have not been sufficiently shared or accepted as legal requirements under national law and practice to bring the relevant convention into force. This in turn raises difficult issues of harmonization and amendment of national laws to bring such international conventions into force.

(10) One other issue to be considered before proceeding to the presentation of proposals is the form in which such proposals are to be cast. It may be recalled that the draft articles on prevention were presented in the form of draft articles encased in some sort of a framework convention on the lines of the draft articles on the law of the non-navigational uses of international watercourses adopted by the Commission in 1994.[135] Those articles were further negotiated and the Convention

[134] Thomas Gehring and Markus Jachtenfuchs, "Liability for Transboundary Environmental Damage towards a General Liability Regime?", *4 E.J.I.L* (1993), 92-106, p. 106.

[135] *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 10* (A/49/10), para. 222.

on the Law of the Non-Navigational Uses of International Watercourses was adopted in 1997.[136]

As the topic is divided into the prevention and liability aspects and as one part was adopted in the form of draft articles, there is a justified expectation of finalizing the other part on liability also in the form of draft articles. Some members of the Commission and representatives of States have already supported this approach. On the other hand, if the draft articles on prevention are treated as the main body of primary principles and liability is only one of its provisions, which is now developed separately, it could be linked to the main draft by way of a protocol, just as some protocols on liability have been developed. The Special Rapporteur, with a completely open mind, suggested this approach in the Commission during its fifty-fifth session in 2003. Several members of the Commission and at least one delegation in the Sixth Committee did not favour this approach. Moreover, several delegations have suggested that the conclusions and recommendations of the Commission should be drafted, not in the form of a convention or protocol, but in the form of general principles with options on various elements that they would encompass, leaving States to pick and choose as they developed their national laws or concluded regional or other sectoral arrangements.

The Special Rapporteur's first report sufficiently brought home the point that there is large diversity of preferences and practice among States concerning the various principles that constitute a regime on international liability. Several elements of civil liability and private international law involve many choices, which need to be settled if a full convention or even a protocol on liability is chosen as our goal: the definition of compensable damage, the designation of entities for the purpose of attaching the primary and secondary or subsidiary liability for compensation, the selection of standard of liability, the choice of exceptions to liability, the construction of the causal connection and the associated issue of who should discharge what standard of burden of proof, the appropriate national judicial forums for submission and settlement of claims of compensation and other issues of private law on choice of applicable law and the recognition and enforcement of foreign awards.

It is not difficult to suggest one model, but this would amount to making arbitrary choices, which some States might accept and others might reject, or might suit one type of hazardous activity but might not be suitable for the other types. Some members of the Commission and several States noted that it is not the task of the Commission to make these choices, particularly because they belong in the area of civil liability, which is the domain of national law, or in the field of private international law, which requires harmonization, taking due account of civil and common law.

37. Given the above considerations, and without prejudice to the final form in which the results of the work of the Commission could be adopted, the Special Rapporteur believes it useful to present his recommendations in the form of general principles with suitable explanations about the options that they may involve. These general principles are attempted on the basis of conclusions drawn by the Special Rapporteur.

[136] General Assembly resolution 51/229; for the text, see A/51/869.

C. Proposed draft principles

38. In the light of the above general conclusions, the following draft principles are suggested for consideration. They are offered without prejudging the final outcome.

1. Scope of application

The present draft principles apply to damage caused by hazardous activities coming within the scope of the draft articles on prevention of transboundary harm from hazardous activities, namely activities not prohibited by international law which involve a risk of causing significant transboundary harm through their physical consequences.

Explanation

(a) Given the scope of the 2001 draft articles on prevention of transboundary harm from hazardous activities and the interrelated nature of the concepts of prevention and liability, the 2002 Working Group of the Commission recommended that the Commission should limit the scope on liability to the same activities which are covered by the regime of prevention.[137] The Commission adopted the report of the Working Group[138] and the proposal received wide support from the views expressed by States and their representatives.

(b) The provision is largely based on article 1 of the draft articles on prevention of transboundary harm from hazardous activities.[139] The four different criteria clarifying the scope of the draft articles on prevention would also apply in the present context.

2. Use of terms

For the purposes of the present draft articles:

(a) "Damage" means significant damage caused to persons, property or the environment; and includes:

(i) Loss of life or personal injury;

(ii) Loss of, or damage to, property other than the property held by the person liable in accordance with these articles;

(iii) Loss of income from an economic interest directly deriving from an impairment of the use of property or natural resources or environment, taking into account savings and costs;

(iv) The costs of measures of reinstatement of the property, or natural resources or environment, limited to the costs of measures actually taken;

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[137] *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10 and corrigendum* (A/57/10 and Corr.1), paras. 447-448.

[138] Ibid., para. 448.

[139] Ibid., *Fifty-sixth Session, Supplement No. 10 and corrigendum* (A/56/10 and Corr.1), para. 97.

(v) The costs of response measures, including any loss or damage caused by such measures, to the extent of the damage that arises out of or results from the hazardous activity;

(b) "Damage to the environment" means loss or damage by impairment of the environment or natural resources;

(c) "Environment" includes: natural resources both abiotic and biotic, such as air, water, soil, fauna and flora and the interaction between the same factors; property which forms part of the cultural heritage; and the characteristic aspects of the landscape;

(d) "Hazardous activity" means an activity that has a risk of causing significant or disastrous harm";

(e) "Operator" means any person in command or control of the activity at the time the incident causing transboundary damage occurs and may include a parent company or other related entity whether corporate or not;

(f) "Transboundary damage" means damage caused in the territory or in other places outside the territory but under the jurisdiction or control of a State other than the State of origin or in other places beyond the jurisdiction or control of any State including the State of origin, whether or not the States or areas concerned share a common border;

(g) "Measures of reinstatement" means any reasonable measures aiming to assess, reinstate or restore damaged or destroyed components of the environment, or where this is not possible, to introduce, where appropriate, the equivalent of these components into the environment. Domestic law may indicate who will be entitled to take such measures;

(h) "Response measures" means any reasonable measures taken by any person, including public authorities, following the occurrence of the transboundary damage, to prevent, minimize or mitigate possible loss or damage or to arrange for environmental clean-up. Domestic law may indicate who will be entitled to take such measures;

(i) "State of origin" means the State in the territory or otherwise under the jurisdiction or control of which the activities referred to in principle 1 are carried out;

(j) "State of injury" means the State in the territory or otherwise under the jurisdiction or control of which transboundary damage occurs;

(k) "State likely to be affected" means the State or States in the territory of which there is a risk of significant transboundary harm, or the State or States which have jurisdiction or control over any other place which is exposed to the risk of such harm;

(l) "States concerned" means the State of origin, the State likely to be affected and the State of injury.

Explanation

(a) This definition follows closely article 2 of the draft articles on prevention of transboundary harm. The question whether it should be transboundary "damage" in respect of the liability aspects of the topic has been raised in the Commission. While it is consistent with existing instruments on liability to refer to "damage", the reference to the broader concept of harm has been retained where the reference is only to the risk of harm and not to the subsequent phase where harm has occurred. To refer to "harm" is consistent with the phase of prevention, and is employed with the same meaning as in the draft articles on prevention.

(b) The definition of damage suggested in principle 2, subparagraph (a), as read with the definition of environment in principle 2, subparagraph (c), goes beyond the definition mostly employed, which is generally confined to damage to persons and property.[140] It may also be noted that the reference to costs of assessment of damage in the definition of "reinstatement" in principle 2, subparagraph (g), and the expression "to arrange for environmental clean-up" in the definition of response measures in principle 2, subparagraph (h), are concepts incorporated in the 1989 Basel Protocol on Liability and Compensation for Damage resulting from Transboundary Movements of Hazardous Wastes and their Disposal. Commenting on their introduction, it is noted that, in comparison to the civil liability conventions covering oil pollution, "there is a shift towards a greater focus on damage to the environment per se rather than primarily on damage to persons and to property".[141]

(c) The additional element in principle 2, subparagraph (g), about the introduction of the equivalent of these components into the environment when restoration of the damaged or destroyed environment is not possible, is a further progressive step in the direction of protection of the environment. This element, which is not reflected in the Basel Protocol, found its place in the United States Oil Pollution Act, 1990,[142] as well as the 1997 Protocol to amend the Vienna Convention on Civil Liability for Nuclear Damage,[143] the 1993 Lugano Convention, the 2003 Kiev Protocol on Civil Liability and Compensation for Damage caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters[144] and the European Union Common Position on a proposed Directive on Liability of 18 September 2003.[145]

(d) Reference to damage to the environment per se, that is, natural resources, which are in the domain of public property and cultural heritage, is widely recommended. The 2002 Working Group of the Commission agreed that loss to persons, property, including elements of State patrimony and natural heritage, and

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[140] For a concise discussion of the differing approaches on the definition of environmental damage, see Philippe Sands, *Principles of Environmental Law*, 2nd ed. (2003), pp. 876-878.

[141] Louise de la Fayatte, "The Concept of Environmental Damage in International Law", in Michael Bowman and Alan Boyle, *Environmental Damage in International and Comparative Law: Problems of Definition and Valuation* (Oxford, 2002), pp. 149-190, 166-167.

[142] Pub. L. No. 101-380, 104 Stat 480 or 33 U.S.C.A., sects. 2701 et seq.

[143] *36 ILM* (1997), 1473.

[144] See P. S. Rao, First report, paras. 58, 92-94, 96, and article 2(g) of the Kiev Protocol, UNECE document MP.WAT/2003/1-CP.TEIA/2003/3.

[145] See the Common Position (EC) No. 58/2003 adopted by the Council on 18 September 2003, *Official Journal of the European Union*, C277 E/10, 18 November 2003, p. 13, article 2(11).

the environment within national jurisdiction should be covered.[146] This view was also endorsed by many delegations in their interventions in the Sixth Committee in 2003. In addition, for reasons stated in my conclusions in paragraph 36, point 8 (b) above, the definition of transboundary damage in principle 2, paragraph (f), is extended to include damage to the environment to areas beyond national jurisdiction.

(e) Other portions of the definition are drafted to be in line with the conclusions and submissions made by the Special Rapporteur, which have received wide support.

3. Compensation of victims and protection of environment

1. The main objective of the present principles is to ensure that victims are not left entirely on their own, within the limits prescribed under national law, to bear the loss that they may suffer due to transboundary damage.

2. The objective is also to ensure that any transboundary damage to environment or natural resources even in areas or places beyond the jurisdiction or control of States arising from the hazardous activities is compensated within the limits and under conditions specified in these principles.

Explanation

(a) There could be several objectives for any liability and compensation regime and hence also of any scheme of allocation of loss in case of transboundary damage.[147] One of the first objectives is to provide protection to victims suffering damage. However, modern concepts of victim protection would appear to relate not only to compensation but also to deterrence and risk-spreading and corrective or distributive justice. The overall objective is however to achieve "cost internalization", which is closely related to the "polluter pays" principle.[148] The European Union Common Position of September 2003 to establish a framework of environmental liability to prevent and remedy environmental damage is based on the principle of the "polluter pays" principle.[149]

(b) Further, modern treaty regimes on liability and compensation have paid particular attention to the protection and restoration and clean-up of environment and natural resources when they are affected by transboundary damage even when

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[146] *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10 and corrigendum* (A/57/10 and Corr.1), para. 448.

[147] See Lucas Bergkamp, *Liability and Environment: Private and Public Law Aspects of Civil Liability for Environmental Harm in an International Context* (Kluwer, 2001), p. 70, fn. 19. Seven functions are identified in this regard. These are: compensation, distribution of losses, allocation of risks, punishment, corrective justice, vindication or satisfaction, and deterrence and prevention.

[148] Ibid., p. 73.

[149] The Directive noted that the "polluter pays" principle, which is included in the EU Treaty and in line with the principle of sustainable development, requires that "an operator whose activity has caused the environmental damage or the imminent threat of such damage is to be held financially liable, in order to induce operators to adopt measures and develop practices to minimize the risks of environmental damage so that their exposure to financial liabilities is reduced".

no private or possessory interests are involved. This is in addition to or independent of the protection of victims. This was well stated by the Conference of Ministers in adopting the 2003 Kiev Protocol. They recognized "the importance of civil liability regimes at the national, regional, and in certain cases, even the global level, to serve as mechanisms of internalizing the effects of industrial accidents and environmental harm."[150]

(c) However, as explained, the main objectives and elements of liability in environmental law which can be found repeatedly in respective agreements are "the restoration of the environment through the allocation of responsibilities, to give pollution victims a remedy to claim for their losses and to promote the aim of restoration thereby, to deter further pollution and to enforce environmental standards through both restoration and deterrence."[151]

(d) The question of *locus standi* for making claims in respect of damage affecting the global commons and environment per se and the natural resources regarded as public property within the jurisdiction of a State is a separate issue, which is dealt with below under principle 8, paragraph (b) of the explanation. While the focus of compensation is generally "victims" in the sense of natural or juridical persons, it also includes States, as appropriate, as custodians of public property or, in the case of areas beyond national jurisdiction and global commons, as constituent members of the international community of States to which *erga omnes* obligations are owed.

4. Prompt and adequate compensation

Alternative A

1. The State of origin shall take necessary measures to ensure that prompt and adequate compensation is available for persons in another State suffering transboundary damage caused by a hazardous activity located within its territory or in places under its jurisdiction or control.

2. The State of origin shall also take necessary measures to ensure that such prompt and adequate compensation is available for transboundary damage to the environment or natural resources of any State or of the areas beyond the jurisdiction and control of any State arising from the hazardous activity located within its territory or in places under its jurisdiction or control.

3. Measures referred to in paragraphs 1 and 2 above may be subject to applicable conditions, limitations or exceptions under the law of the State of origin which authorized the activity.

4. When considering evidence of the causal link between the hazardous activity and the transboundary damage, [due] account

[150] See the Declaration by the Ministers of Environment of the region of the United Nations Economic Commission for Europe, ECE/CEP/94/Rev.1, Part E.

[151] Rudiger Wolfrum, Christine Langenfeld and Petra Minnerop, Environmental Liability in International Law: Towards a Coherent Conception, *Research report of the Max Planck Institute for Comparative Public Law and International Law*, Heidelberg, for the Federal Environment Agency of Germany, January 2004, pp. 717-718. On file with the Special Rapporteur.

shall be taken of the risk of causing significant damage inherent in the hazardous activity.

Alternative B

1. The operator of a hazardous activity located within the territory or in places within the jurisdiction and control of a State shall be liable for the transboundary damage caused by that activity to persons or environment or natural resources within the territory or in places under the jurisdiction and control of any other State or to environment or natural resources in areas beyond the jurisdiction and control of any State.

2. The liability of the operator is subject to applicable conditions, limitations or exceptions under the law of the State of origin which authorized the activity.

3. When considering evidence of the causal link between the hazardous activity and the transboundary damage, [due] account shall be taken of the risk of causing significant damage inherent in the hazardous activity.

Explanation

(a) This is a key provision in the structure of the draft principles. The two alternatives take into account the continuing differences in approach that seem to prevail. The Special Rapporteur is mindful of the fact that many of the instruments dealing with civil liability have not been widely ratified and some of them are not in force. The first alternative therefore seeks to establish a possible common ground for compromise. The promotional language used in alternative A is not intended to obscure the concrete legal obligation that it seeks to establish. At the same time, it is designed to give the State of origin the needed flexibility to achieve the broad objectives of these principles in any one of several ways of its choice.

(b) The long debate on the question of transboundary liability both within the Commission and in the Sixth Committee of the General Assembly clearly identified priority for the operator's liability in any scheme of allocation of loss. The definition of operator, however, is not as clear.[152] Liability is channelled generally through a single entity and in the case of stationary operations, to the operator of the installation. However, other possibilities exist. In the case of ships, the owner, and not the operator, bears liability. Thus, charterers — who may be the actual operators — are not liable under the 1969 International Convention on Civil Liability for Oil Pollution Damage.[153] Under the 1989 Basel Protocol, waste generators, exporters, importers and disposers are all potentially liable at different stages in the transit of waste. The real underlying principle does not seem to be that the "operator" is always liable, rather it is the party with the most effective

[152] It is interesting to note that article 2(6) of the EU Directive of 2003 defines operator as "any natural or legal, private or public person who operates or controls the occupational activity or, where this is provided for in national legislation, to whom decisive economic power over the technical functioning of such an activity has been delegated, including the holder of a permit or authorization for such an activity or the person registering or notifying such an activity."

[153] United Nations, *Treaty Series*, vol. 973, p. 3. See also P. S. Rao, First report, paras. 47-54, for a description of the oil pollution liability regime.

command or control of the risk at the time of the accident who is made primarily liable.

(c) In cases where harm is caused by more than one activity and could not reasonably be traced to any one of them or cannot be separated with a sufficient degree of certainty, jurisdictions have tended to make provision for joint and several liability. Joint and several liability has several disadvantages. It may be considered unfair; it constitutes "over-deterrence"; it gives rise to problems of insurability; it is uncertain and has administrative costs. Although not favourable to industry, it is protective of the interests of the victim. In order to obviate the possible adverse effects of the rule, the operator may be required to prove the extent of damage caused by him to identify his share of liability. Existing international instruments also provide for that kind of possibility. In any case it is for individual agreements or national choice to provide for joint and several liability.

(d) Strict liability has been recognized in many jurisdictions where liability is assigned to the operator in respect of inherently dangerous or hazardous activities. It is arguably a general principle of international law, or in any case could be considered as a measure of progressive development of international law. In the case of activities which are not dangerous but still carry the risk of causing significant harm, there perhaps is a better case for liability to be linked to fault or negligence. Strict liability has been adopted in some of the recently negotiated conventions, such as the Kiev Protocol (article 4), the Basel Protocol (article 4) and the Lugano Convention (article 8). There are several reasons for this choice. It relieves courts of the difficult task of setting appropriate standards of reasonable care and plaintiffs of the burden of proving breach of those standards in relatively complex technical industrial processes and installations. The risk of very serious and widespread damage, despite its low probability, places all these activities in the ultra-hazardous category. It would be unjust and inappropriate to make the plaintiff shoulder a heavy burden of proof of fault or negligence in respect of highly complex technological activities whose risks and operation the concerned industry closely guards as a secret.

(e) Further, profits associated with the risky activity are the main motivation for the industry in undertaking such activity. Strict liability regimes are generally assumed to provide incentives for better management of risk involved. This is an assumption which may not always hold up. As these activities have been accepted only because of their social utility and indispensability for economic growth, States may consider at the opportune time reviewing their indispensability by exploring more environmentally sound alternatives which are also at the same time less hazardous. There should be an effort at international cooperation to progressively eliminate ultra-hazardous activities through better technology and its availability to all States.

(f) Equally common is the concept of limited liability, particularly in cases where strict liability is opted for. Limited liability has several policy objectives. It is justified as a matter of convenience to encourage responsible — as opposed to unscrupulous — operators to continue engaging in the hazardous but socially and economically beneficial activity. It is also aimed at securing reasonable insurance coverage for the activity. Further, if liability has to be strict, that is if liability has to be established without a heavy burden of proof for the claimants, limited liability

may be regarded as a quid pro quo. None of these statements are self-evident truths, but are widely regarded as relevant.[154]

(g) It is of course arguable that the scheme of limited liability is unsatisfactory insofar as it is incapable of providing sufficient incentive to the operator to take stricter measures of prevention. If the limits are set too low it could even become a licence to pollute or cause injury to others and externalize the real costs of the operator. Furthermore, it may be incapable of meeting all the legitimate demands and claims of innocent victims for reparation in case of injury. For this reason, it is important to set the limits of financial liability at a sufficiently high level, keeping in view the magnitude of the risk of the activity and the reasonable possibility for insurance to cover a significant portion of the same. One advantage of a strict but limited liability from the perspective of the victim is that the person concerned need not prove negligence and would also know precisely whom to sue. Such limits are well known in the case of regimes governing oil pollution at sea and nuclear incidents.[155]

(h) Article 9 of the Kiev Protocol and article 12 of the Basel Protocol provide for strict but limited liability. In contrast, the Lugano Convention opted for strict liability (articles 6.1 and 7.1) with no provision for limiting the liability. Where limits are imposed on the financial liability of the operator, generally such limits do not affect any interest or costs awarded by the competent court. Moreover, limits of liability are subject to review on a re ular basis.

(i) Most conventions exclude limited liability in case of fault. The operator is made liable for the damage caused or contributed to by his or her wrongful, intentional, reckless or negligent acts or omissions. Specific provisions to this effect are available in article 5 of the Basel Protocol and article 5 of the Kiev Protocol. In the case of operations involving highly complicated chemical or industrial processes or technology, fault liability could pose a serious burden of proof for the victims. Their rights could be more securely safeguarded in several ways. For example, the burden of proof could be reversed, requiring the operator to prove that no negligence or intentional wrongful conduct was involved. Liberal inferences might be drawn from the inherently dangerous activity. Or statutory obligations could be placed upon the operator to give the victims or the public access to the information concerning the operations.[156]

(j) It is also usual for conventions and national laws providing for strict liability to specify a limited set of fairly uniform exceptions to the operator's liability. A typical illustration of the exceptions to liability can be found in articles 8 and 9 of the Lugano Convention or article 4 of the Kiev Protocol. Liability is excepted if, despite taking all appropriate measures, the damage was the result of (a) an act of armed conflict, hostilities, civil war or insurrection; or (b) the result of a natural phenomenon of exceptional, inevitable, unforeseeable and irresistible character; or (c) wholly the result of compliance with a compulsory measure of a

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[154] See Robin R. Churchill, "Facilitating (Transnational) Civil Liability Litigation for Environmental Damage by Means of Treaties: Progress, Problems, and Prospects", *12 Yb. Int. Env. L.* (2001), 3-41, pp. 35-37.

[155] See P. S. Rao, First report, paras. 47-49, 56-57, 83-85.

[156] For a discussion on fault-based liability as a tool of equal importance for securing the rights of victims, see ibid., para. 119.

public authority in the State of injury; or (d) wholly the result of the wrongful intentional conduct of a third party.

(k) If, however, the person who has suffered damage has by his or her own fault caused the damage or contributed to it, the compensation may be denied or reduced having regard to all the circumstances.

(l) If liability of the operator is exempted for any one of the reasons noted above, the victim would be left alone to bear the loss. It is customary for States to reimburse them with ex-gratia payments in addition to providing relief and rehabilitation assistance. Further, compensation would also be available from the supplementary funding mechanisms. In the case of exemption of operator liability because of the exception concerning compliance with the public policy and regulations of the Government, there is also the possibility to lay the claims of compensation before the State concerned.

5. Supplementary compensation

1. The States concerned shall take the necessary measures to establish supplementary funding mechanisms to compensate victims of transboundary damage who are unable to obtain prompt and adequate compensation from the operator for a [legally] established claim for such damage under the present principles.

2. Such funding mechanisms may be developed out of contributions from the principal beneficiaries of the activity, the same class of operators, earmarked State funds or a combination thereof.

3. The States concerned shall establish criteria for determining insufficiency of compensation under the present draft principles.

Explanation

(a) Most liability regimes concerning dangerous activities are complemented by additional funding sources to compensate victims of damage arising from such activities when the operator's liability is not adequate to provide necessary redress. Contributions to such additional funding are made either from operators engaged in the operation of the same category of dangerous activity or from entities that have a direct interest in carrying the hazardous activity. The 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971,[157] the SuperFund organized under the United States Comprehensive Environmental Response, Compensation and Liability Act of 1980,[158] the arrangement to share the liability of the operator who is insolvent under the Offshore Pollution Liability Agreement (OPOL),[159] the special compensation facility available to developing States and States with economies in transition under article 15 of the Basel Protocol as read with decision V/32 on the use of the

[157] *11 ILM* (1972), 284. See also P. S. Rao, First report, paras. 47-54, for a description of the oil fund regime.

[158] Pub. L. No. 99-499, 100 Stat.1613.

[159] www.opol.org.uk/agreement.pdf.

Technical Cooperation Trust Fund provide for such supplementary funding mechanisms.

(b) In the context of managing nuclear liability, there are supplementary compensation schemes to which States also make direct contributions.[160]

6. Insurance and financial schemes

The States concerned shall take the necessary measures to ensure that the operator establishes and maintains financial security such as insurance, bonds or other financial guarantees to cover claims of compensation.

Explanation

(a) The States concerned may establish minimum limits for financial security for such purpose, taking into consideration the availability of capital resources through banks or other financial agencies. Even insurance schemes may require a certain minimum financial solvency from the operator to extend their coverage. Under most schemes, the operator is obliged to obtain insurance and such other suitable financial security. This may be particularly necessary to be able to take advantage of the limited financial liability scheme, where it is available. However, in view of the diversity of legal systems and differences in economic conditions, some flexibility for States in requiring and arranging suitable financial and security guarantees may be envisaged.[161] An effective insurance system may also require wide participation by potentially interested States.[162]

(b) As pointed out by a proposal for European Union Directive of 2002 for environmental liability, "financial assurance is beneficial for all stakeholders: for public authorities and the public in general, it is one of the most effective, if not the only, way of ensuring that restoration actually takes place in line with the polluter pays principle; for industry operators, it provides a way of spreading risks and managing uncertainties; for the insurance industry, it is a sizeable market." The proposal also noted that insurance coverage is available for clean-up costs. Similarly, such insurance is available at even earlier stage in the United States. The experience gained in these markets can be quickly transferred to other markets as the insurance industry is growing into a global market.[163]

(c) One of the consequences of ensuring the availability of insurance and financial security is that a claim for compensation may be allowed as one option under domestic law directly against any person providing financial security coverage. However, such a person may be given the right to require the operator to be joined in the proceedings. Such a person is also entitled to invoke the defences to which the operator would be entitled under law. Article 11, paragraph 3, of the Kiev Protocol and article 14, paragraph 4, of the Basel Protocol provide for this

[160] P. S. Rao, First report, pp. 20, 25, 26, 29 and 30.

[161] See for example the statement by China, in *Official Records of the General Assembly, Fifty-eighth Session, Summary Records, Sixth Committee*, A/C.6/58/SR.19, para. 43.

[162] See for example the statement by Italy, A/C.6/58/SR.17, para. 28.

[163] See Proposal for a Directive of the European Parliament and of the Council on environmental liability with regard to the prevention and remedying of environmental damage, Brussels, 23 January 2002, COM (2002) 17 final, pp. 7-9. It may be noted that the proposal has since been revised and adopted as EU Common Position of September, 2003.

possibility. However, both Protocols allow States to make a declaration if they wish not to allow for such a direct action.

7. Response action

1. States shall require all operators involved in the conduct of activities falling within the scope of the present principles to take prompt and effective action in response to any incident involving such activities with a view to minimizing any damage from the incident, including any transboundary damage. Such response action shall include prompt notification, consultation and cooperation with all potentially affected States.

2. In the event that the operator fails to take the required prompt and effective response action the State of origin shall, where appropriate, in consultation with the States likely to be affected, make arrangements for such action.

Explanation

(a) It may be recalled that articles 16 and 17 of the draft articles on prevention deal with the requirements of "emergency preparedness" and "notification of emergency". The present principle on responsive action is different and goes beyond those provisions. It deals with the need to take the necessary response action within the State of origin after the occurrence of an incident resulting in damage, but if possible before it acquires the character of a transboundary damage. The operator has the primary obligation to put in place all the emergency preparedness and press the same to action as soon as an incident has occurred. In case the operator is unable to take the necessary response action, the State of origin is required to make the necessary arrangements to take such action. In this process it can seek necessary and available help from other States or competent international organizations.

(b) There is also a duty for the State of origin to consult the States likely to be affected to determine the best possible response action to prevent or mitigate a transboundary damage. Conversely there is also a duty on the part of States likely to be affected to extend to the State of origin their full cooperation and take such response measures as are within their power in areas under their jurisdictions to help prevent or mitigate such transboundary damage.

8. Availability of recourse procedures

1. The States concerned shall ensure the availability of prompt, adequate and effective administrative and judicial remedies to all the victims of transboundary damage arising from the operation of hazardous activities.

2. States shall ensure that such remedies are no less prompt, adequate and effective than those available to their nationals and include access to such information as is necessary to exercise their right of access to compensation.

3. Each State shall ensure that its courts possess the necessary competence to entertain such claims for compensation.

Explanation

(a) Paragraph 1 seeks to ensure the availability of prompt and adequate access to judicial remedies to "all the victims". As noted above, victims for the purpose of the draft principles are in the first place persons, natural or juridical, who suffer the damage either to their person or to their property. There is a growing body of international conventions which provides for all persons, irrespective of their nationality or residence, or the place of occurrence of injury, non-discriminatory access, in accordance with its legal system, to judicial or other procedures to seek appropriate remedies, including compensation. The national procedures and remedies to which access is to be made available should be equal to those that are provided under national law to one's own citizens. It may be recalled that article 16 of the draft articles on prevention provides similar obligation for States in respect of the phase of prevention during which they are required to manage the risk with all due diligence. A similar non-discrimination provision covering the phase where injury actually occurred, despite all best efforts to prevent damage, can be found in article 32 of the 1997 Convention on the Law of the Non-Navigational Uses of International Watercourses. Article 72 of the Helsinki Rules as revised also has a similar provision.[164]

(b) The important point to note is that the principle of non-discriminatory and equal access does not guarantee any substantive standard of liability and no minimum procedural rights other than those that are granted under national law to the citizens. Furthermore, it does not alleviate problems concerning choice of law, which is, given the diversity and lack of any consensus among States, a significant obstacle to delivering prompt, adequate and effective judicial recourse and remedies to victims,[165] particularly if they are poor and not assisted by expert counsel in the field. In spite of these disadvantages, the principle is still a step in the right direction and may even be regarded as essential. States could move matters forward by promoting the harmonization of laws, by agreement to extend such access and remedies. At the election of the plaintiff, equal right of access could be made available in the courts of a party only where: (a) the damage was suffered; (b) the operator has his or her habitual residence; or (c) the operator has his or her principal place of business.

(c) Such an option is made available under the 1968 Brussels Convention on Civil Jurisdiction and Enforcement of Judgements in civil and commercial matters. Article 19 of the 1993 Lugano Convention, article 17 of the 1999 Basel Protocol and article 13 of the 2003 Kiev Protocol provide for similar choice of forums.

(d) Secondly, in respect of damage to environment per se and natural resources, which are public property and available for collective and common enjoyment within the jurisdiction of a State, "victims" in the sense of paragraph 1 are also those designated under national laws to act as public trustees to safeguard those resources and hence the legal standing to sue. The concept of public trust in many jurisdictions provides proper standing to different designated persons to lay

[164] The [Revised] International Law Association Rules on the Equitable Use of Sustainable Development of Waters, 10th Draft, February 2004.

[165] K. W. Cuperus and Alan E. Boyle, "Articles on Private Law Remedies for Transboundary Damage in International Watercourses", in Report of the Sixty-Seventh Conference, Helsinki, Finland, 12-17, 1996 (1996), pp. 403-411, p. 406.

claims for restoration and clean-up in case of any transboundary damage.[166] Under United States law, the Oil Pollution Act of 1990, such a right is given to the United States Government, a state, an Indian tribe and a foreign Government. Under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) 1980, as amended in 1986 by the SuperFund Amendments and Reauthorization Act, *locus standi* has been given to only the federal Government, authorized representatives of states, as trustees of natural resources or by designated trustees of Indian tribes. In many European jurisdictions, public authorities have been given similar right of recourse. Norwegian law provides standing to private organizations and societies to claim restoration costs. In France, some environmental associations have been given the right to claim compensation in criminal cases involving violation of certain environmental statutes. The 1998 Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters gives standing to NGOs to act on behalf of public environmental interests.[167] The proposal for the European Union Directive of 2002 also provides to certain recognized NGOs the right to request competent authorities to act in certain circumstances as measure of good governance. Under articles 5 and 6, these competent authorities, to be designated under article 13, may require the operator to take the necessary preventive or restoration measures or take such measures themselves, if the operator does not take them or cannot be found.[168]

(e) In the case of damage to areas beyond the national jurisdiction of any State, the question of standing to sue is not a settled principle. If the damage is the result of breach of an obligation owed to a State or to a State as member of a group of States, or the breach is of a character such that it affects the enjoyment of rights and obligations by all States, then under the law of State responsibility, the State concerned could sue in its own right as an injured State. But in the case of the environmental damage of areas beyond the national jurisdiction of any State, that is, of global commons, where obligations to any one State are not adversely affected, it is widely accepted that it should be treated as a violation of the *erga omnes* obligation. Article 48 of the draft articles on responsibility of States for internationally wrongful acts adopted by the International Law Commission in 2001[169] recognizes this principle; it recognizes the right of a State not directly injured to invoke the responsibility of the State if the injury involves any one of two types of breach of obligation. One relates to an obligation "owed to a group of States including that State, and is established for the collective interest of the group". The other relates to an obligation "owed to the international community as a whole". In the case of the first type of breach, the obligation should be one that is established in the collective interest, whereas in the latter case, all obligations are by definition established in the collective interest of all States.[170] Examples of such global common interests may be found in the growing number of international

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[166] Peter Wetterstein, "A Proprietary or Possessory Interest: A Conditio Sine Qua Non for Claiming Damages for Environmental Impairment?", in Peter Wetterstein (ed.), *Harm to the Environment: The Right to Compensation and the Assessment of Damages* (1997), pp. 29-54, p. 50-51.

[167] For the text see *39 ILM* (1999), 517.

[168] Proposal for a Directive of the European Parliament, supra note 164, pp. 20, 22.

[169] *Official Records of the General Assembly, Fifty-sixth Session, Supplement 10 and corrigendum* (A/56/10 and Corr.1), para. 76.

[170] James Crawford, *The International Law Commission's Draft Articles on State Responsibility* (2002), para. 10, p. 278.

treaties and customary law concerned with the protection of the global environment or of areas of common interest or concern. "The same will be true", according to one comment, "of *erga omnes* customary obligations, including the duty to protect the marine environment or the environment of common areas beyond national jurisdiction".[171]

(f) States could also consider the feasibility and desirability of according legal standing to any legal person, entity or organization, whether intergovernmental or not, on the same lines as in the case of the protection of environment and natural resources within domestic jurisdiction. The implication of this broad standing to sue must, however, be kept in view. Birnie and Boyle have aptly explained the limited significance of this right, from which it does not follow that the full range of reparations will be available, thus:

> "What is clear is that third States have the same right as injured States to seek cessation of any breach of obligations owed to the international community as a whole. Beyond that, the availability of reparation will depend on the circumstances of the breach, the extent to which claimant's interests are affected, and the nature of the risk to community interests. It is for example unlikely that individual States will be entitled to demand compensation for material damage to the global environment beyond any clean-up or reinstatement costs which they may incur."[172]

(g) The right of recourse is a principle based on non-discrimination and equal access to national remedies. For all its disadvantages, the principle does go beyond the requirement that States meet a minimum standard of effectiveness in the availability of remedies for transboundary claimants, in providing access to information, and in ensuring appropriate cooperation between the relevant courts and national authorities across national boundaries. This principle is also reflected in principle 10 of the Rio Declaration, and in principle 23 of the World Charter for Nature. It is also increasingly recognized in national constitutional law regarding protection of the environment.[173] The 1998 Aarhus Convention, which is an improvement over the 1990 EC Directive and article 9 of the 1992 OSPAR Convention, obliges parties to ensure that public authorities make available to the public "environmental information" without any interest having to be stated, generally in the form requested, and without an unreasonable charge being made.[174]

(h) The right to access to information on industrial and hazardous activities having an impact on the environment and creating human health hazards in general, and for the purpose of safeguarding the legal rights of citizens and victims of damage arising from such activities, may be regarded as a second generation of rules following the obligations of reporting, notification, consultation and negotiation incorporated, for example, in the ILC draft articles on prevention.[175] Without prejudice to existing international obligations, and with due regard to the legitimate interest of the person holding the information, States are required to provide for access to information and access to justice accordingly. There is much room for improvement in the further articulation and enforcement of this duty. With increased

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[171] Patricia Birnie and Alan Boyle, *International Law and the Environment* (2002), p. 197.

[172] Ibid.

[173] K. W. Cuperus and A. E. Boyle, p.407.

[174] Phillipe Sands, *Principles of International Environmental Law* (second edition, 2003), p. 858.

[175] Ibid., p. 867. On environmental information in general see chap. 17.

awareness of environmental and other hazards due to hazardous activities, the public will demand a greater role in decisions concerning their establishment and management. With the increasing focus on good governance, there are greater demands on Governments around the world for accountability and transparency in their work. Greater systematization and retrieval of relevant information is also necessary. The right of access to information is only the lower end of the equation; the obligation of government to provide the public at large with that information, even without their seeking it, is at the other end.

(i) The right of recourse to judicial and procedural remedies could be subject to limitation periods, for example five years from the date on which the claimant knew or ought reasonably to have known of the damage and of the identity of the operator. It may also be stipulated that in no case may such actions be brought after, for example, 30 years from the date of the incident, which caused the damage. Article 10 of the Kiev Protocol (3 and 15 years), article 13 of the Basel Protocol (5 and 10) and article 17 of the Lugano Convention (3 and 30) provide for similar limitations of time to bring forth claims for compensation.

(j) Proceedings pending in different courts concerning the same subject matter between the same parties could by agreement among the States concerned be left to be considered by the court that is first seized of the matter. Further, other courts may be obliged to decline to entertain their jurisdiction once they are under the jurisdiction of the first court. Similar provisions and the possibility of consolidation of claims in article 15, paragraphs 1 and 2, of the Kiev Protocol, in articles 15 (3), (4) and (5) and 18 of the Basel Protocol and articles 21 and 22 of the Lugano Convention are intended to guard against forum shopping and safeguard the integrity of the process of litigation by streamlining the procedures.

(k) Recognition and enforcement of judgements given in a foreign jurisdiction form an important component of an effective regime of remedies for victims of transboundary hazardous activities. A decision rendered in one State is meaningless if it cannot be recognized and enforced in another State. Article 18 of the Kiev Protocol, article 21 of the Basel Protocol and article 23 of the Lugano Convention provide for such recognition and enforcement.[176]

[176] A standard provision on recognition and enforcement may read as follows:
"1. Any decision given by a court with jurisdiction in accordance with Article [on availability of recourse procedures] above where it is no longer subject to ordinary forms of review, shall be recognised in any Party, unless: (i) such recognition is contrary to public policy in the Party in which recognition is sought; (ii) it was given in default of appearance and the defendant was not duly served with the document which instituted the proceedings or with an equivalent document in sufficient time to enable him to arrange for his defence; (iii) the decision is irreconcilable with a decision given in a dispute between the same parties in the Party in which recognition is sought; or (iv) the decision is irreconcilable with an earlier decision given in another State involving the same cause of action and between the same parties, provided that this latter decision fulfils the conditions necessary for its recognition in the Party addressed.
"2. A decision recognized under paragraph 1 above, which is enforceable in the Party of origin, shall be enforceable in each Party as soon as the formalities required by that Party have been completed. The formalities shall not permit the merits of the case to be reopened".

9. **Relationship with other rules of international law**

The present set of principles is without prejudice to rights and obligations of the Parties under the rules of general international law with respect to the international responsibility of States.

Explanation

The need to develop any international regime on allocation of loss in case of transboundary damage without prejudice to other rules of international law, in particular the responsibility of States under international law, has been a cornerstone of the present exercise. This is also endorsed and finds reflection in article 12 of the Kiev Protocol

10. **Settlement of disputes**

1. Any dispute concerning the interpretation or application of the present articles shall be settled expeditiously through peaceful means of settlement, including negotiations, mediation, conciliation, arbitration or judicial settlement.

2. For a dispute not resolved in accordance with paragraph 1, parties may by mutual agreement accept either or both of the means of dispute settlement, that is, (a) submission of the dispute to the International Court of Justice or (b) arbitration

Explanation

(a) Apart from the fact that these provisions represent the demand of some members of the Commission and of some States or their representatives, article 26 of the Kiev Protocol provides for a similar obligation for the settlement of disputes. In addition, article 14 of the Kiev Protocol also provides for a final and binding arbitration in accordance with the Permanent Court of Arbitration Optional Rules for Arbitration of Disputes relating to Natural Resources and/or the Environment. In the event of a dispute between persons claiming damage pursuant to the Protocol and persons liable under the Protocol, such arbitration could be resorted to, however, only by agreement among all the parties involved.

11. **Development of more detailed and specific international regimes**

1. States shall cooperate in the development of appropriate international agreements on a global or regional basis in order to prescribe more detailed arrangements regarding the prevention and response measures to be followed in respect of a particular class of hazardous activities as well as the insurance and compensation measures to be provided.

2. Such agreements may include industry- and/or State-funded compensation funds to provide supplementary compensation in the event that the financial resources of the operator, including insurance, are insufficient to cover the losses suffered as result of an incident. Any such funds may be designed to supplement or replace national industry-based funds.

Explanation

This principle points to the need for States to enter into more detailed arrangements and tailor them to the particular and specific circumstances of individual hazardous activities. It is also a recognition that there are several variables in the regime concerning liability for transboundary harm that are best left to the discretion of individual States or their national laws or practice as a basis for selection or choice, given their own particular needs and political and economic realities. Arrangements concluded on a regional basis with respect to a specific category of hazardous activities are likely to be more fruitful and durable in protecting the interest of their citizens, the environment and the natural resources on which they are dependent.

12. Implementation

1. States shall adopt any legislative, regulatory and administrative measures that may be necessary to implement the above provisions.

2. These provisions and any implementing provisions shall be applied among all States without discrimination based on nationality, domicile or residence.

3. States shall cooperate with each other to implement the provisions according to their obligations under international law.

Explanation

This provision is intended to complement the role played by States in establishing supplementary but necessary domestic implementing mechanisms for giving effect to their international obligations concerning international liability. It is drawn on the basis of article 8 of the Kiev Protocol.